Before the
Federal Communications Commission
Washington, DC 20554

In re Application of	)	
	)	
Revision of Procedures Governing Amendments	)	MB Docket No. 05-210
To FM Table of Allotments and Changes	)	RM-10960
of Community of License in the Radio Broadcast	)	
Services	)	

Filed With: **Office of the Secretary**

Directed to: **The Commission**

PETITION FOR RECONSIDERATION

Georgia-Carolina Radiocasting, Inc., by its attorney, hereby requests partial reconsideration and clarification of the *Report and Order* issued in the above-referenced proceeding. With respect there, to following is stated:

The Federal Communications Commission has adopted a *Report and Order* that establishes rules to revise and improve the FM Table of Allotments and AM community of license modification procedures. In principal part, as proposed in the *Notice of Proposed Rulemaking*, 20 FCC Rcd 11169 (2005), the *Report and Order* compresses the two-step process for requests to change AM and FM station communities of license by eliminating the rulemaking step for FM requests and the auction application step for AM requests; establishes a requirement that FCC Forms 301 be filed simultaneously with requests for new allotments; opens up the ability for rulemaking proponents for new FM channels to file their proposals electronically; and establishes restrictions on the abandonment of sole aural services from current communities. Moreover, the Commission has modified its rules to allow, for the first time, for FM station channels to engage in non-adjacent channel substitutions. *Report and Order* at ¶ 16; 47 C.F.R. § 73.3573(a)(1)(iv).

This Petition for Reconsideration seeks reconsideration of certain aspects of the rules, and clarification of certain new procedures adopted therein.

Channel Substitutions. Under the old application rules, broadcast stations authorized to operate on a given frequency could only engage in channel substitutions onto new channels if the operation on the new channel was mutually-exclusive with operations as authorized on the old channel.[1] Under the new rules, for FM stations, all "[c]hannel substitutions for authorized facilities will be treated as "minor" changes. Voluntary changes must be proposed in the FCC Form 301 applications as set for below." *Report and Order* at ¶ 16. The procedures adopted, however, are limited to FM stations. There are no procedures established for filing for non-adjacent (first, second, or third adjacent channels) channel/frequency substitutions for AM stations. This oversight should be corrected on reconsideration[2].

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[1] The prior version of the FM rule stated in relevant part:

> A licensee or permittee may seek the higher or lower class adjacent channel, intermediate frequency co channel or the same class adjacent channel of its existing FM broadcast station authorization by filing a minor change application.

47 C.F.R. § 73.3573(a)(1). The AM rules stated:

> A major change for an AM station authorized under this part is any change in community of license or in frequency, except frequency changes to non-expanded band first, second or third adjacent channels.

47 C.F.R. § 73.3571(a)(1).

[2] The new version of §73.3573(a)(1) also should be modified and edited to more closely track the intent of the *Report and Order*. All voluntary same-class FM channel substitutions may now be submitted as minor changes. Therefore, there it makes no sense to any longer list "same class first-, second or third-adjacent channel or intermediate frequency" channel substitutions as a separate category, as is currently the case in the version of § 73.3573(a)(1)(iii) adopted in the *Report and Order*. Subsections (iii) and (iv) of the rule should be essentially combined, to state simply and clearly that the following is not a "major facility change":

> (iii) any same-class channel substitution, subject, however, in the case of involuntary substitutions, to the provisions of Section 316 of the Communications Act.

Under the current rules, AM station owners may make non-adjacent channel substitutions only during Major Change Windows, which open infrequently, at best. Just as FM stations were freed from the rulemaking process in making channel substitutions *or* city of license changes, so too should AM stations be freed from Major Change Windows in both these respects. As seen below, AM stations are equally, if not more, in need of the flexibility inherent in the minor change process to substitute channels and improve service to the public, and no reason appears to exist to restrict this rule relaxation to FM stations.

Conversely, the benefits are obvious. An example, that mirrors an actual situation, is illustrative. Station A operates on a high frequency channel 1540 kHz in Town A. It has 1000 watts day and 50 watts at night, and is designated as a "Class D" station. From a technical standpoint, Station A can move to a much lower frequency channel, 930 kHz, on which it can maintain its daytime power of 1000 watts but would cover twice as many people. It can also operate with 50 watts at night on 930 kHz, but since it is a lower channel, it would cover four times as many people at night. Allowing this modification to be freely filed as a minor change application clearly would be in the public interest.

Allowing such an AM channel substitution clearly would not be precluded under law. As to protecting other parties' rights under *Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945)*, no parties' rights would be adversely affected. As the Commission already concluded in this very proceeding:

> Moreover, it is unclear how such proposed procedures would harm the rights of counter-proponents. As indicated above, a prospective applicant is not a party to whom the *Ashbacker* doctrine applies.39 Also, the Commission has concluded that *Ashbacker* does not preclude it from adopting rules that foreclose the filing of competing applications where doing so serves the public interest.40 In the *One-Step Order*, the Commission explained that "[i]n *Ashbacker*, the United States Supreme Court held that where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give it. However, the

Court has noted that the Commission can promulgate rules limiting eligibility to apply for a channel when such action promotes the public interest, convenience, and necessity."41 For similar reasons, we tentatively conclude that *Ashbacker* is not an obstacle to permitting AM and FM station community of license changes by minor modification applications.

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39 *See supra* paragraph 20. *See also One-Step Order*, 8 FCC Rcd at 4739 and n.28.

40 *See supra* paragraph 20, citing *One-Step Order*, 8 FCC Rcd at 4739.

41 *One-Step Order*, 8 FCC Rcd at 4739

Notice of Proposed Rulemaking, 20 FCC Rcd at 11177, ¶ 24. Moreover, in such a case, there *are no* other even "potential" applicants affected. New daytime-only proposals no longer are being accepted by the Commission. In order for any new applicant to apply for this facility, this station would have to operate with a minimum of 250 watts, which it would require a six tower array. It is not only economically impossible for such a facility to be built in today's world, it also is technically improbable for anyone to build the facility as a "new" station – as *either* a minor or major change. Furthermore, the spectrum for AM is so congested in most populated areas, the usable area for 930 kHz only can be used in that tiny geographical area and specifically Town A. So, in such example, realistically, the improvement to better serve the public can only be provided by the existing station licensee, and the only way in which the proposal can quickly be implemented is by permitting it to be applied for as a minor change.

Finally, it is not relevant AM channel substitutions were not specifically discussed in the *NPRM* issued in this proceeding. FM channel substitution also were not specifically, individually, proposed in the *NPRM*, and Georgia-Carolina expressly accepts and endorses their adopted as a natural outgrowth of the matters proposed in the *NPRM*.

Filing of FCC Form 301 and Fee with Allocations Rule Making Petitions.

Under the new rules adopted in the *Report and Order* in this proceeding, the FCC is requiring an allotment proponent simultaneously file an FCC Form 301 with its petition and an appropriate fee. Georgia-Carolina does not oppose this rule and procedure change. However, insofar as the Commission will be requiring that a complete long-form application be submitted, it believes that a clarification of the Commission's procedures is necessary and appropriate in three important respects.

Site Availability

The FCC traditionally has required "reasonable assurance" of site availability when submitting an application for new station or for site change. *William F. Wallace and Anne K. Wallace*, 49 F.C.C.2d 1424 (Rev. Bd. 1974). The specification of a site is an implied representation that an applicant has obtained reasonable assurance that the site will be available. A failure to inquire as to the availability of a site until after the application is filed is inconsistent with such a representation. See *William F. Wallace*, supra. In the mid-1980's, the FCC even strengthened this requirement to require submission of the name and telephone number of the site owner or its representative as a part of the application. *Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications*, 58 R.R.2d 776, ¶ 22 (1985). Applicants have been disqualified from broadcast station ownership when found to have misrepresented the availability of a site.

In *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instruction Fixed Service Licenses*, 13 FCC Rcd 15920 (1998), the Commission stated:

> ***Elimination of Reasonable Assurance of Site Certification.*** In the *Notice*, 12 FCC Rcd at 22396 (¶ 81), we proposed to eliminate the requirement that applicants certify they have a "reasonable assurance" that the site or structure proposed as the location of their transmitting antennas will be available. We requested comment on our proposal to delete the reasonable assurance of site certification from the FCC Forms 301, 346 and 349, and to rely on the strict enforcement of our existing construction requirements to ensure that winning bidders in future broadcast auctions construct their facilities in a timely manner. Given the relatively brief time period that winning bidders will have to prepare and file their long-form applications following the close of a broadcast auction, we surmised that elimination of the requirement of reasonable assurance of site availability was appropriate.
>
> A certification of site availability, requiring that an applicant certify that reasonable assurance has been obtained from the property owner that the site will be available, was added to the FCC Form 301, at the request of commenters, as a component of the "hard look" processing approach. The certification provided verification of existing Commission policy and was implemented as a deterrent to the filing of frivolous and speculative applications that frustrated our processing goals.
>
> We believe that the competitive bidding process itself serves to lessen the incentive for insincere application filings and provides a strong stimulus for timely station construction, so to recapture bidding investments. We therefore will eliminate the reasonable assurance of site certification requirement for all broadcast and secondary broadcast new and major change applicants, regardless of whether the long-form application is submitted post-auction by a winning bidder, or by an applicant determined to be non-mutually exclusive.
>
> Furthermore, our construction period requirements provide the Commission with an additional safeguard to ensure that winning bidders construct their authorized facilities in a timely manner. The Commission has found that the strict enforcement of such build-out requirements, in conjunction with the employment of competitive bidding procedures, best promote the rapid deployment of service to the public. Although some commenters urge the Commission to retain the site certification requirement, we no longer find it vital to our pursuit of prompt initiation of service to the public.

Id. at 15987-88.

It has remained unclear as to the scope of this elimination, *i.e.*, whether the Commission (i) eliminated entirely the requirement for "reasonable assurance," or whether it (ii) merely eliminated the requirement for applicant's to overtly *certify* (as a part of the application) that "reasonable assurance" of site availability has been obtained. In support of the latter interpretation, subsequent to issuance of the foregoing *First Report and Order*, the FCC revised its FCC Form 301, apparently stating clearly in the instructions that substantively applicants' responsibilities with respect to site availability had *not* changed. As the form stated:

> Applicants filing this FCC Form 301 also are not required to certify that the site specified in FCC form is available for its intended use. See Auctions Order at ¶¶ 172-175. Nevertheless, the Commission's substantive site availability requirements are unchanged. All applicants for broadcast facilities must have a reasonable assurance that the site specified will be available at the time they file the FCC Form 301. See William F. And Anne K. Wallace, 49 FCC 2d 1424, 1427 (Rev. Bd. 1989); Genessee Communications, Inc., 3 FCC Rcd 3595 (1988); National Innovative Programming Network, 2 FCC Rcd 5641 (1987).

1998 Biennial Review -- Streamlining of Mass Media Applications, Rules, and Processes, 13 FCC Rcd 23056 at 23121-22, FCC Form 301, General Instructions at 3, ¶ K (1998) (emphasis added). Those remain the Instruction the FCC Form 301, as revised and reissued this week, as Instruction L. Consistently, in the recent case of *Keith E. Lamonica*, 21 FCC Rcd 1417 (MMB 2006), the Bureau indicated that "reasonable assurance" remains a requirement in broadcast applications.

In the *Report and Order*, the Commission did not address whether, in conjunction with the filing of an FCC Form 301 at the allotment stage, it is necessary for an applicant/proponent to have "reasonable assurance" of the availability of the transmitter specified in the filed application at the time the application is filed (as indicated in Instruction L of the FCC Form 301), or whether rulemaking proponent/applicants are exempt from that requirement.

Financial Qualifications

Similarly, the FCC traditionally has required that applicants have "reasonable assurance" of financial ability to construct "at the time the application is filed." Revision of Form 301, 50 R.R.2d 381 (1981). Under this procedure, applicants were merely required to certify that "sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." The Commission adopted this procedure in lieu of retaining a requirement that applicants itemize the

costs of constructing and operating the facility and document, and submit a balance sheet, a statement of yearly income and assorted items of documentation. The Commission stressed that, in adopting the certification requirement, the Commission was not modifying the basic substantive financial requirement, *i.e.*, that the applicant have the ability to construct and operate the proposed station for three months, nor were we changing the factual basis for meeting that requirement. In 1989, the FCC strengthened the requirement, requiring applicants submit information concerning the total funds estimated to be needed, and information concerning the proposed source of the funds. *Revision of Applications for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 FCC Rcd 3853, 42 (1989). Although in 1989, the FCC did away with the requirement that applicants certify to their finances as a part of the FCC Form 301,[1] in the FCC Form 301 adopted subsequently, the FCC stated:

> Applicants are not required to certify as to their financial qualifications on FCC Form 301. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Fixed Service Licenses, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264, FCC 98-194 (August 18, 1998), ¶¶ 172-176 ("Auctions Order"). Nevertheless, the Commission's substantive financial qualification requirements are unchanged. **All applicants for new broadcast facilities must have reasonable assurance of committed financing sufficient to construct the proposed facility and operate it for three months without revenue at the time they file the FCC Form 301.** See Merrimack Valley Broadcasting, Inc., 82 FCC 2d 166, 167 (1980); Liberty Productions, 7 FCC Rcd 7581, 7584 (1992).

1998 Biennial Review -- Streamlining of Mass Media Applications, Rules, and Processes, 13 FCC Rcd 23056 at 23121, FCC Form 301, General Instructions at 3, ¶ J (1998) (emphasis

[1] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instruction Fixed Service Licenses*, 13 FCC Rcd 15920, 19589 (1998).

added).[2] That language also remains a part of the Form issued this week and is binding upon applicants, today, as Instruction K.

In the *Report and Order*, the Commission did not address whether, in conjunction with the filing of an FCC Form 301 at the allotment stage, it is necessary for an applicant/proponent to acquire "reasonable assurance" of financial ability to construct the proposed facility prior to filing the application (as literally indicated in Instruction K of the FCC Form 301), or whether rulemaking proponent/applicants are exempt from that requirement.

Proposed Revision

Under the FCC's new policies, the FCC Form 301 application being submitted simultaneously with a given rulemaking proposal is contingent upon (1) the allotment eventually being adopted; (2) the applicant being the successful high bidder; and (3) the applicant submitting its high bid. It is uncertain (1) how long it will take for the allotment to successful complete the rulemaking process; or (2) how quickly the allotment will be set for auction. To expect an applicant to go through the time and effort to acquire site and financial assurances sufficient to establish "reasonable assurance" of those matters, when the continued processing of the application nevertheless is largely speculative, would be arguably unreasonable.

Therefore, it should be specifically declared on reconsideration that Instructions K and L to the current FCC Form 301 do not apply to applications being filed as a part of the

[2] Under those existing, ongoing requirements, a broadcast applicant has the burden of establishing its financial qualifications. 47 U.S.C. § 308(b); see *Northampton Media Associates v. FCC*, 941 F.2d 1214 (D.C. Cir. 1991). In order to be financially qualified, an applicant must have secured a "present firm intention" from a financing source, future conditions permitting, to provide sufficient funds to construct and operate the proposed station for three months without revenues (*Merrimack Valley Broadcasting, Inc.*, 82 F.C.C.2d 166, 167 (1980) (emphasis added); *Financial Qualifications Standards for Aural Broadcast Applicants*, 68 F.C.C.2d 407, 408 (1987).

Commission's allotment rulemaking process, and that allotment proponents are not required to acquire "reasonable assurance" of finances or site availability when submitting their FCC Form 301.[3]

Alternatively, if such is not the case, in the interest of clarity and fairness, the Commission should make clear on reconsideration that in submitting the required contingent application (FCC Form 301) simultaneously with an allotment rulemaking proposal, that Instructions K and L do, in fact, fully apply, and that an applicant will be implicitly reciting that it does, indeed, have "reasonable assurance" of site availability and finances upon submission of the application, and failure to have done so is an actionable misrepresentation which may well affect the rulemaking proponent's qualifications to become a Commission licensee.

City-Grade Coverage and Longly-Rice Showings

Section 73.315 of the Commission's Rules of the Rules requires coverage of 100% of a proposed community of license. While the FCC entertains waivers of the coverage requirement at the application stage and has found that 80% coverage results in "substantial compliance" with

[3] Accord, *Chenango Bridge, Norwich, and Cincinnatus, NY*, 8 FCC Rcd 6221 (Chief, Allocations Branch, 1993):

> In rule making proceedings to allot FM channels, "the question as to the availability and suitability of an antenna site in a marginal situation is important only to the extent of whether, if a channel were to be assigned, there is a reasonable assurance that a station would be able to provide adequate service to the community. The question of whether a specific site is legally available and suitable is a matter to be more appropriately considered in connection with an application for a construction permit for the use of a channel." Pinckneyville, Illinois, 30 R.R. 2d 1344, 1347 (1974). In other words, there must be a theoretical site which meets the Commission's various technical rules. See, e.g., *Key West, Florida*, 3 FCC Rcd 6423 (1988).

Id. at n.8.

the coverage requirement,[4] the FCC requires 100% city-grade coverage at the allotment stage. See, e.g., *Cloverdale, Montgomery and Warrior, AL*, 15 FCC Rcd 11050, ¶ 6 (2000):

> We continue to believe that there is a valid reason for considering Section 73.315(a) differently at the allotment stage as opposed to the application stage. At the allotment stage, we determine coverage by utilizing the maximum power for the class and the antenna height above average terrain ("HAAT"), the latter being determined by averaging the elevations along each of eight radials from 3 to 16 kilometers from a theoretical reference site. We cannot evaluate the actual transmitter site that will be specified in the successful application ... because no such site yet exists. Here, there is no assurance that [the applicant] will be the successful applicant nor is there a requirement that he actually specify this site in his application. Thus, consideration of a waiver request at the allotment stage would be inappropriate.

Id. at ¶ 6. Moreover, under Section 73.313 of the Rules, however, only average terrain calculations (as determined using the eight cardinal radials from a reference site) are used in determining whether the entire community is provided the requisite 70 dBu signal coverage. The Commission generally has not departed from that requirement in allotment proceedings except when it is able to apply the exception known as the "Woodstock" exception, and does not allow the use of terrain factors to enhance propagation of a 70 dBu signal in the direction of a proposed community of license. *Woodstock and Broadway, Virginia*, 3 FCC Rcd 6398, ¶ (1988) ("we believe it would elevate form over substance to apply that assumption here, where the petitioner has taken the affirmative steps necessary to allow us to evaluate a specific site").

Under the Commission's new procedures, rulemaking proposals are, to a certain extent, simultaneously at the "rulemaking stage" and the "application stage." Applicants not only are required to file an FCC Form 301 simultaneously with a rulemaking proposal, they also are now

[4] *John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985) and *Letter to Southwest Communications, Inc.*, ref. 8920-HVT (MMB July 16, 1986) (80 percent city-grade signal coverage of community deemed substantial compliance with 47 C.F.R. §73.315); *Amendments of Parts 73 and 74 of the Commission's Rules To Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, 12 FCC Rcd 12371, ¶11 (1997).

required to specify an actual site. Thus, the major policy considerations that (i) previously forbid the extension of the Commission's city-grade coverage waiver policy, and (ii) generally prohibited of use of Longley-Rice at the rulemaking stage for purposes of determining city-grade coverage, no longer are relevant -- even at the "allotment stage," the FCC will have a specific application proposal and site before it for evaluation, which is specified in the actual application that will be used by the applicant/proponent in the event the allotment is adopted and it is the successful high bidder.

Thus, on reconsideration, the FCC should make clear that in amending its rules and procedures, rulemaking proponents will now as a result have greater flexibility in submitting allotment proposals in the way described above.

WHEREFORE, it is respectfully requested that this Petition for Reconsideration be accepted, and the Commission's rules be clarified to the extent described herein.

Respectfully submitted,

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